

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 64 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

BENSON MUTUA MWANZIA.....ACCUSED

RULING ON A CASE TO ANSWER

1. The accused Benson Mutua Mwanzia is charged with Murder contrary to section 203 as read with section 204 of the Penal Code. The particulars being that the accused on 21st October, 2014 at Nduu village, Matungulu Sub-County within Machakos County murdered Benard Kioko Kisoi.
2. A plea of not guilty was entered. The prosecution called a total of nine (9) witnesses. Submissions on a case to answer were tendered. It was submitted on behalf of the accused that it came out from the prosecution evidence that there was a grudge between PW1 and the accused but that none of the prosecution witnesses saw who shot the arrow thereby no malice aforethought was established. That the accused finger prints were never dusted so as to ascertain if it is he who committed the offence. The prosecutor on the other hand submitted that PW1 testified that he had an outstanding boundary dispute. That he deceived PW1 and the deceased that he was going to change his clothes so that they can visit the area chief but proceeded to attack them. That in the circumstances malice aforethought was established.
3. This court's concern at this stage of the proceedings is whether or not a prima facie case has been made out by the prosecution. The court in **Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335**, discussed what constitutes a prima facie case as follows:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction.” This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is “some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence”. A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence...It may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

4. It emerged from the prosecution evidence that Kisoi Musimba Samuel (PW1) was called by the area chief and sub-chief to go to his farm for purposes of settling a boundary dispute between him and the accused. PW1 went to the farm in company of his son, the deceased. On reaching, they did not find the area chief and sub chief but found the accused. PW1 inquired from the accused if he has seen the two but said that PW1 and the deceased should not wait. The accused then left. PW1 and the deceased waited for about 30 minutes and pondered whether or not they should leave for home. The deceased then opted to go to get information from the accused but PW1 refused to go the accused's home. After a while, PW1 heard the deceased crying. He ran to him and saw him removing an arrow from behind his neck. PW1 then using his handkerchief tried to stop the bleeding but he too got shot by an arrow. He stated that he did not see whoever shot but that the arrow came from the accused's house. The deceased had at the time fallen down and PW1 took off. He got shot at again while running away. He managed to get to the police station where he made a report.
5. Dr. Eric Mburu (PW7) confirmed the deceased's death. He stated that the deceased sustained a penetrating wound about 3 × 1 cm on the left side of his neck which was deep all the way to the chest cavity with severed muscles. That the right lung had a penetrating wound while the cardiovascular system had a haemothorax hemorrhage. That the cause of death was severe hemorrhage due to sharp penetrating wound.
6. Lawrence Kinyua Muthuri (PW8) an analyst at Government Chemist gave evidence that DNA profile generated from the bloodstains on the arrows produced by the prosecution as P. Exhibit 1 a and b matched that of the deceased.
7. Police Constable Fredrick Maina (PW9) received the report of the incident on 21st October, 2014 at around 1.00 pm. He visited the scene together with Police Constable Wanjohi. There they found the deceased's body lying on the ground with blood oozing on the left side of his neck.
8. I have duly considered the evidence and without delving into the merits of this case at this stage, I am satisfied that the prosecution has made out a prima facie case against the accused person requiring him be called upon to make a defence. Consequently, I find the accused has a case to answer and is called upon to make a defence in accordance with the provisions of Section 306(2) of the Criminal Procedure Code.

It is so ordered.

Dated and delivered at Machakos this. 17th day of October, 2018.

D. K. KEMEI

JUDGE